TAN EAN LENG & ANOR. v. PENTADBIR TANAH DAERAH, KUALA MUDA, SUNGEI PATANI

[O.C.J. (Lim Beng Choon J.) February 22, 1987]

[Alor Setar – Originating Motion No. 32-23-86]

Land Law – Sale and purchase of land and subsequent transfer – Whether transfer should be registered – Whether "registrable dealing" under the National Land Code – National Land Code, s. 205(3) & (5).

By an agreement of sale dated April 5, 1979, the plaintiffs purchased a certain land. The purchase price was settled in full on February 28, 1980. Thereafter, a transfer was executed in respect of the land.

Subsequently by a letter dated June 23, 1986, the Land Administrator, Kuala Muda, Sungei Patani rejected the registration of the transfer instrument under section 205(3) of the National Land Code. The plaintiffs applied by way of a motion to set aside the decision of the Land Administrator.

The sole question in the present case was therefore whether the dealing entered into by the applicant, namely, the purchase and sale agreement relating to the land in question, was a registrable dealing under the National Land Code.

Held: (1) the new subsection (5) of section 205 validates the dealings as those contained in the present application;

(2) in any event, if there was any ambiguity or uncertainty in the wordings of subsection (5) it should be construed in favour of the applicant;

(3) in the present case, the registrar was wrong in refusing to register the instrument of transfer as presented to him.

Case referred to:

(1) *Tan Hong Chit* v. *Lim Kin Wan* [1964] M.L.J. 113.

ORIGINATING MOTION.

V. Muthusamy for the plaintiffs.

Abdul Malik bin Haji Ishak (State Legal Adviser, Kedah) for the defendant.

Cur. Adv. Vult.

Lim Beng Choon J.: The sole question in the present case is therefore whether the dealing entered into by the applicant, namely, the purchase and sale agreement relating to the land in question, is a registrable dealing under the National Land Code. Although subsection (3) of section 205 of the National Land Code provides that no dealing in respect of any alienated land or any interest therein subject to category agriculture shall be effected if such dealing would have the effect of creating any undivided share of such size that would be less than 2/5 of a hectare, nevertheless by the second amendment by Act A615 it is clearly stated that nothing contained in subsection (3) shall render invalid any instrument in dealing in any alienated land executed under this part before the commencement of this subsection. To my mind, the effect of the new subsection (5) validates the dealings as contained in the application for transfer made to the registrar. In any event, even if there is any ambiguity or uncertainty in the wording of subsection (5) it should be construed in favour of the applicant. In this respect, I would refer to the case of *Tan Hong Chit* v. *Lim Kin Wan*[1] where Suffian J. (as he then was) said:

"It has been held by the Privy Council in *David* v. *De Silva* [1934] A.C. 106 that where there is ambiguity as to the meaning of a disabling statute the construction which is in favour of the freedom of the individual should be given effect to."

In view of the authority and of the proper construction of subsection (5), I am of the view that the registrar was wrong in refusing to register the instrument of transfer as presented to him. I therefore granted an order in terms in respect of prayers (1), (2), (3) and (6).

Order accordingly.

Solicitors: *V. Muthusamy & Co.*

CETICO SDN. BHD. v. THE TROPICAL VENEER CO. BHD.

[O.C.J. (Shankar J.) October 27, 1986]

[Johore Bahru – Companies Winding-up No. 42-57 of 1986]

Companies and Corporations – Winding up of company – Petition for – Application by secured creditor to stay or dismiss petition – Merits of application – Unanimous wish of unsecured creditors to prevail over secured creditor.

The respondent, Tropical Veneer Co. Bhd., was a company that owed UMBC (the applicant in the present proceedings) a large amount of money. UMBC was a secured creditor. The respondent, however, also owed other unsecured creditors about $6 million. The unsecured creditors, including the petitioner Cetico Sdn. Bhd., presented a petition to the court to wind up the company. UMBC applied to dismiss or stay the petition.

Held, dismissing the application: (1) in the circumstances of this case, the unanimous wish of the unsecured creditors must prevail over the applicant bank;

(2) had the applicant bank and the receivers and managers acted in good time so as to put the unsecured creditors in a position in which they could have made an informal appraisal of their chances of recovery of some portion of their losses, and if some acceptable profit-sharing arrangement had been broached so that the unsecured creditors were not made to feel that they were being pressured into sacrificing their remedy in exchange for the eligibility of standing in the queue four years from now, the court may have been disposed to look at the matter differently.

[*Editorial Note:* The applicant bank appealed from this decision to the Supreme Court *vide* Supreme Court Civil Appeal No. 477 of 1986. The appeal was dismissed by the Supreme Court (Salleh Abas L.P., Seah & Syed Agil Barakbah S.C.JJ.) on June 9, 1987.]

Cases referred to:

(1) *Re P. & J. Macrae Ltd.* [1961] 1 W.L.R. 229.
(2) *Re Crigglestone Coal Company* [1906] 2 Ch. 327.

COMPANIES WINDING UP.

P.S. Gill for the applicant bank.

Ong Ban Chai for the petitioner.

Cur. Adv. Vult.

Shankar J.: This is an application for the dismissal or the stay of a petition by Cetico Sdn. Bhd. ("Cetico") to have The Tropical Veneer Co. Bhd. ("the company") wound up.

The United Malayan Banking Corporation ("the bank") are debenture holders of the company. On September 30, 1986 the bank was owed $8,990,868. As at September 30, 1985, the amount stated in the company's books to be owing to its unsecured creditors was about $6,640,013.

At the hearing of the petition, apart from Cetico, 16 other unsecured creditors appeared after giving due notice of their intention to support the petition. Together with the petitioner, the total amount due to these unsecured creditors is roughly about $1,636,000. Putting it quite simply, the issue that I now have to decide is whether I ought to dismiss or stay this petition merely because the bank is opposed to the making of the winding-up order because their receivers and managers are of the opinion that if the company is allowed to continue trading, they could hopefully make enough money to pay off all the company's debts by the year 1990.

Mr. Paramjit Singh Gill who appeared on behalf of the bank's receivers and managers had presented a most eloquent argument as to why the bank's wishes should prevail over that of the unsecured creditors. In the present economic climate, the issue raised is one of some public importance and it is desirable that I should now proceed to give my reasons in full for the order which I will shortly be making.

The company was incorporated in 1964 with an authorized capital of $50 million and a paid-up capital of $11 million.

The debentures to the bank were created in 1971 and in 1979. On 4 November 1985, the financial position of the company had become so precarious that the bank appointed M/s Toby Lam and Rohailan Mohamed to be the receivers and managers of the company. Mr. Ong Ban Chai, counsel for the petitioner, has submitted that these receivers and managers have not complied with section 186 of the Companies Act ("the Act") which required notice of the appointment to be filed with the registrar within seven days, and section 190 of the Act which required detailed accounts to be filed within one month after the expiration of the period of six months from the date of the appointment. If these omissions have in fact occurred, they can be made the subject of an investigation by the proper authorities in due course. They have no direct bearing on the issues which I now have to decide.

On May 23, 1986, Cetico's solicitors served the statutory demand, pursuant to section 218 of the Act, on the company to pay up $154,533.09, being the balance purchase price of diesel sold and delivered to the company. The debt was not paid, and on June 21, 1986 Cetico filed its petition. The petition was indorsed with an order that it be heard in this High Court on August 25, 1986. On July 10, 1986 the petition was served on the company. It was gazetted on July 17, 1986 and advertised in the national newspapers on July 30 and July 31, 1986. It follows, therefore, that the company, the bank, and the receivers and managers must have known that winding-up proceedings were pending in the Johore Bahru High Court by those dates.

On July 9, 1986, the receivers and managers entered into an agreement with Panma Heavy & Chemical Equipments Sdn. Bhd. for the purposes of extracting timber from a concession which had been granted to the company in Trengganu. On August 7, 1986, the receivers and managers prepared a report setting their assumptions and the projected profit to be derived from the continued operations of the company. They hoped to realize a profit of $394,000 in 1986, $2,715,000 in 1987, $3,719,000 in 1988, $4,918,000 in 1989, and $5,993,000 in 1990. But these expectations were

based on several assumptions, one of which was that the Yayasan Trengganu would grant the company an additional 10,000 acres to the 40,000 acres which the company had already worked out.

By August 25, 11 unsecured creditors had filed notices of intention to appear and support the petition. There were no notices filed in opposition at that time. The petition was not heard on August 25, 1986. It was postponed to October 13, 1986 and written notice to this effect was given to all parties concerned by the senior assistant registrar of this court on September 24, 1986. The petition was then once again advertised in the newspapers and the new date of hearing made known to the public.

Rule 30 of the Companies Winding-Up Rules ("the Rules") provides that affidavits in opposition to a petition that a company may be wound up shall be filed, and a copy thereof served on the petitioner at least seven days before the time appointed for the hearing of the petition. The notice of intention to appear, however, need only be given by 12 noon on the day preceeding the hearing: see rule 28.

The remaining unsecured creditors all filed their notices in good time. But it would appear that the bank's notice of intention to appear was sent from Kuala Lumpur on October 10, 1986 and did not reach the court until October 14, 1986. Furthermore, on the morning of the hearing, the bank's solicitor filed a voluminous affidavit affirmed by Dr. Steven Leong, a senior officer of the bank.

There is plenty of authority to the effect that the court has a very wide discretion as to what order it will make on a winding-up petition. But it must be said, and with the strongest emphasis, that filing voluminous affidavits on the morning of the hearing is not calculated to inspire confidence in the *bona fides* of its deponents or their advisers. All the facts and figures contained in Dr. Steven Leong's affidavit were available to the bank, and the receivers and managers months before the hearing. If due notice is not given, the winding-up rules provide for the court to disallow a person to appear without special leave.

In all the circumstances of this case, however, I granted a short adjournment in order to permit the petitioner and the supporting creditors some small opportunity of familiarizing themselves with the contents of the bank's affidavit and enclosures. That done, the petitioner and the supporting creditors were unanimous in their request that the winding-up order be made.

Apart from the hopes and expectations of the receivers and managers based upon their projection of anticipated profits, it was alleged for the bank that the largest unsecured creditor was Malayan Adhesive & Chemical Sdn. Bhd. to whom the amount owing was $1,288,599.23 and that discussions had taken place between them and the receivers and managers and that they had agreed to supply chemicals for the continued manufacturing operations of the company. It was said that this creditor had indicated its willingness to consider some scheme of arrangement for the further management of the company. I place little or no weight on this. This particular unsecured creditor did not appear in court, and seem not prepared to accept hearsay evidence on what they may or may not be prepared to do. In any case, the general state of the market is such that its current philosophy is embodied in the maxim "In God we trust, everyone else pays cash". It does not seem to me a reasonable inference that this creditor would continue to supply chemicals other than for cash.

So, what it then came down to was that because Cetico's claim only amounted to approximately 2.33% of the total unsecured creditors and about 1% of the total amount of the secured and unsecured debts, this court should have primary regard to the wishes of the bank. Here again, this court cannot ignore the fact that the scheme proposed is not wholly based on altruistic motives. The bank, and the receivers and managers have no doubt formed the view in their own, quite natural, material instincts that if the petition is dismissed, they will get something and perhaps in due time everything, from whomsoever is providing the money, and their argument is that if the company is wound up, the unsecured creditors will find an absence of anything available for them.

But as the figures in the projected profit show, the general administration, financial expenses, and selling and distribution expenses (which would presumably include the fees payable to the receivers and managers) range from $1,104,000 in 1986 and rise to a figure of $2,589,000 in 1990. There was a loss of $1,694,000 in 1986 and I am unable to predicate with any certainty that the anticipated profits from 1987 to 1990 will materialize as a matter of course.

The other problem here is that, if the winding-up order is not made, the unsecured creditors will have no control over the manner in which the company is run and they will have no right of access to any information as to how the company is disposing of its assets. Perhaps, it is not entirely irrelevant to observe that Dr. Steven Leong's affidavit

was not accompanied by an up-to-date auditor's report by way of a balance sheet and a profit and loss account, so as to present a true and fair view of the present financial situation of the company. As solicitor for one of the supporting creditors, Miss G.F. Liow stated from the Bar table that for tax purposes, a public company which had sustained losses may in fact be worth a considerable amount on the open market if it is sold as a going concern. For what it is worth, I have taken note of this.

In *Re P. & J. Macrae Ltd.*[1] it was held that the bare fact that the opposing creditors were in a majority was not of itself sufficient, still less conclusive, to require a judge to exercise his discretion in their favour. But this was a case where every unsecured creditor who appeared, supported the petition. The bank was alone in its opposition to it. Does the mere fact that they were owed about $3 million more than the unsecured creditors make such a difference?

The court is obliged to Mr. Gill for making available *The Law of Company Liquidation* by McPherson (2nd Ed.) (1980). With respect, it seems to me, that the author's comments are most helpful.

At p. 55 it is stated:

"There are in fact, certainly no more than five, and probably only four, reasons which will justify the court in refusing to make an order on the petition of an unpaid creditor. These are that (1) the petitioner's debt amounts to less than £100; (2) the debt is *bona fide* disputed by the company; (3) the company has paid or tendered payment of petitioner's debt; (4) winding up is opposed by other creditors; and (5) the company is in the process of being wound up voluntarily."

At pp. 61 and 62 it is stated:

"Opposition to winding up may proceed from the petitioner's fellow-creditors, who may be secured or unsecured, or from the company or (what is virtually the same thing) from the shareholders. The significance of opposition to winding up varies in direct proportion to the relative importance of the opposing interests involved. Where the company is insolvent, the foremost consideration naturally is in the interests of the creditors; and these prevail over the interests of other persons likely to be affected by the winding up, such as the company and shareholders. As regards creditors, more importance attaches to the views of the unsecured creditors for the obvious reason that, unlike the secured creditors, they have no means other than winding up by which they can obtain payment of their debts."

And at p. 64 it is stated:

"Obviously the general or unsecured creditors are the ones most likely to be affected by the refusal to make an order, for it will deprive them of what is virtually their only remedy against the company. It follows that their wishes in the matter are, as against those of other creditors, entitled to primary consideration (*Re Airfast Services Pty. Ltd.* (1976) 2 A.C.L.R.)."

After dealing with the case of *Re Crigglestone Coal Company*[2] at p. 335, the author continues:

"For practical purposes the debenture holders in this case were virtually in the same position as shareholders since they had an obvious interest in ensuring that the company and its business were continued so that the profits earned could be used to discharge the company's liabilities for principal and interest on the debentures. In circumstances such as these it would be most unjust to refuse the order since a secured creditor, when he makes his loan, bargains to receive security as his protection against loss in the event of winding up and it would not be right to give him the power to impair the remedy which exists primarily for the benefit of unsecured creditors. However, the decision probably does not go so far as to establish that the wishes of unsecured creditors in the matter of winding up will invariably be preferred to those of creditors who are secured, although this is likely to be so in all cases except those where the injury which winding up will inflict upon the latter is out of all proportion to the benefit it will bestow on the former."

Relying upon these observations, it seems to me that the duty of this court is clear. In all the circumstances of this case, the unanimous wishes of the unsecured creditors must prevail over the bank, who can have their cake and eat it.

As I have indicated earlier, these proceedings were in the public knowledge for some months now. Had the bank and the receivers and managers acted in good time so as to put the unsecured creditors in a position in which they could have made an informal appraisal of their chances of recovery of some portion of their losses, and if some acceptable profit sharing arrangement had been broached so that the unsecured creditors were not made to feel that they were being pressured into sacrificing their only remedy in exchange for the eligibility of standing in the queue four years from now, this court may have been disposed to look at the matter differently.

On the material before me, however, and with respect to Mr. P.S. Gill, who has said everything which could have been said for the bank, the only order that I can make is to dismiss his application and to make an order in terms of this petition. I further order that the costs of this application shall be taxed and paid by the bank to the petitioner and the supporting creditors.

Order accordingly.

Solicitors: *Ong Ban Chai & Co.; Gill & Tang.*